No. 20308

(No. 20656 Consolidated)

In the

United States Court of Appeals

For the Ninth Circuit

ANGUS J. DEPINTO and MARGARET F. DEPINTO,

Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,

Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,

Appellees.

Opening Brief of Appellants, Angus J. and Margaret F. DePinto, and Intervenor-Appellant, James P. Donohue

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(For convenience, Provident Security Life Insurance Company will be referred to as "Provident"; United Security Life will be referred to as "United". "T.R." refers to Transcript of Record; "R.T." refers to Reporter's Transcript.)

A.

JURISDICTION

This action was instituted in the United States District Court for the District of Arizona by the Appellants, Angus J. DePinto and his wife, Margaret F. DePinto, as plaintiffs, against Appellees, Provident Security Life Insurance Co., a corporation, and Albert J. Doig, as defendants. The purpose of the action was to secure an adjudication that a judgment in favor of Provident and against Angus J. DePinto in Cause No. Civ.-2974-Phx. (which is now the subject of an appeal to this Court in Cause No. 20553), does not constitute a community obligation of appellants which may be legally satisfied out of their community property, and to enjoin appellees from issuing, or causing to be issued, levied or served upon and against appellant's community property, writs of execution, writs of garnishment or other process for the satisfaction of the aforesaid judgment.

Jurisdiction in Cause No. Civ.-2974-Phx. was based on 28 *U.S.C.A.* § 1332, Diversity of Citizenship. The jurisdiction of the United States District Court in this action is ancillary to Cause No. Civ.-2974-Phx. 2 Cyclopedia Federal Procedure, 111 et seq.; *Pacific Railroad of Missouri v. Missouri Pacific Railroad Co.,* 111 U.S. 505, 4 S.Ct. 583, 28 L.Ed. 498; *Martina Theater Corp. v. Schine Chain Theaters, Inc.,* 278 F.2d 798 (2d Cir. 1960); *St. Louis-San Francisco Railroad Co. v. Byrnes,* 24 F.2d 66 (8th Cir. 1928).

The appeals to this Court were instituted pursuant to Rule 73 of the Federal Rules of Civil Procedure. 28 *U.S.C.A.* § 1291 and § 1292 grant to this Court jurisdiction to review the judgment of the lower Court and the order denying appellants' petition for a preliminary injunction.

B.

STATEMENT OF THE CASE

1. Proceedings in the Lower Court.

After the filing of appellants' Complaint (T.R. 1), a hearing was held in the lower Court upon appellants' petition for a preliminary injunction to restrain the sale of appellants' community property in satisfaction of the judgment rendered against DePinto in Cause No. Civ.-2974-Phx. After that hearing, the lower Court entered an order denying the requested relief. (T.R. 9, 54) Appellants then filed a notice of appeal to this Court (T.R. 13), and also a motion for injunction pending appeal. (T.R. 15) The motion was denied (T.R. 55). The appellees filed answers to appellants' Complaint, and motions for summary judgment. (T.R. 17, 22, 25, 44) The motions for summary judgment were based upon:

> "Rule 56, the cases thereunder, the pleadings, oral testimony at the hearing on the application for a 'preliminary injunction', the certified transcript in Civil No. 2974, exhibits at the said hearing, presumptions, concessions of counsel, stipulations, and additional material admissible in evidence or otherwise usable at a trial." (T.R. 25)

In opposition to the appellees' motion for summary judgment, the appellants filed affidavits of Angus J. DePinto, Joseph S. Lentz and Paul M. Roca. (T.R. 29-34)

The motions for summary judgment were granted (T.R. 55), and judgment was entered in favor of appellees and against the appellants, dismissing the action. (T.R. 49) Appellants then filed their notice of appeal to this Court. (T.R. 51) That appeal was docketed herein as No. 20656, and by order of this Court, consolidated with Cause No. 20308.

Subsequent to the institution of these Appeals, DePinto was adjudicated a bankrupt and James P. Donohue was appointed as Trustee in Bankruptcy of the DePinto Estate. On the 15th of June, 1966, an order was entered herein granting the petition of the Trustee to intervene herein.

2. Facts.

By their answers to appellants' Complaint, the appellees admitted that, on or about the 28th day of June, 1965, a judgment was entered in Cause No. 2974-Phx., in favor of Provident and against Angus J. DePinto, in the sum of $314,794.19, with interest, and that such judgment was based upon alleged acts or omissions of DePinto while serving as a member of the Board of Directors of United Security Life, an Arizona corporation, which was later merged into Provident. (T.R. 1, 17, 22)

At the hearing held upon appellants' petition for a preliminary injunction, Angus J. DePinto testified, among other things: The DePintos were married in Chicago, Illinois, in 1932. When they came to Arizona in 1936, they had no property. They have resided continuously in Phoenix, Arizona since 1936. They acquired property as the result of investing the proceeds from Dr. DePinto's medical practice. DePinto was elected to the Board of Directors of United Securities Life in October, 1955. He has never owned any of the capital stock of United, and has not had any financial interest in that company of any kind, shape or form. DePinto serve dupon the Board of Directors of United purely as a matter of friendship with the organizer of the company, a Mr. James E. Kelly. DePinto did not receive any compensation for serving as a member of the Board of Directors and was not promised anything in the way of compensation for such services. He had no reason

to anticipate that he would receive any financial benefit for his services as a member of the Board of United. DePinto served upon the Board until October of 1957. DePinto did not secure Mrs. DePinto's consent to his service upon the Board of Directors of United. He did not discuss the matter with her. (R.T. 13-18) DePinto was not benefited in any way, financially, socially or otherwise, from serving as a member of the Board of Directors of United. It did not result in any increase in his medical practice. (R.T. 21) DePinto became a director of United only to help the company and Mr. Kelly, not himself. (R.T. 41-42)

Mrs. DePinto testified, among other things: She and Dr. DePinto came to Phoenix from Chicago in 1936, at which time, they had no property. Thereafter, they continuously resided in Phoenix, Arizona and, at all times, have been husband and wife. The DePintos became acquainted with the James E. Kelly family in Carlsbad, California, in about 1947 or 1948. The Kellys later moved to Phoenix. About eight or ten years ago, Mrs. DePinto learned that Dr. DePinto was serving as a member of the Board of Directors of "Kelly's insurance company". Dr. DePinto did not ask whether she consented to, or approved of, his serving on the Board of Directors of United. Mrs. DePinto did not, at any time, tell Dr. DePinto that she approved or consented to such service. The DePintos have no financial interest in United Security Life. During their marriage, property of the DePintos was acquired other than by gifts or inheritance. If Mrs. DePinto had asked Dr. DePinto to "get off the Board" of United, he wouldn't have done it anyway. (R.T. 111-117)

The attorneys for appellees read into the record portions of the "Admitted facts", set forth in the pretrial conference

order which had been entered in Cause No. Civ.-2974-Phx., which, in part, read:

> "51. On October 14, 1955, DePinto was elected a member of United's Board of Directors. At the time DePinto became a director of United, he never intended to be an active director of United's Board of Directors.
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> * * * * * * *
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> "53. In becoming a Director of United, DePinto responded to a request from Kelly that DePinto permit Kelly to use DePinto as a member of United's Board of Directors.
>
> "54. In agreeing to become a director of United, DePinto being a good friend of Kelly allowed Kelly the privilege of DePinto's name.
>
> "55. DePinto became a director of United because he was out to help Kelly and really thought he, Kelly, needed a helping hand and was there to give it." (R.T. 33-34)

In opposition to appellees' motions for summary judgment, the appellants filed affidavits of DePinto, Dr. Joseph S. Lentz and Paul M. Roca. The affidavit of Dr. DePinto reads:

> "1. For more than 30 years last past, Affiant has engaged in the practice of medicine in the City of Phoenix, Arizona. His practice has been limited to obstetrics. During the period from 1950 to 1960, Affiant was fully occupied with his medical practice and had substantially all of the patients to whom he could give adequate attention. There was no reason for Affiant to engage in any activities designed to increase the number of persons who were seeking his services as an obstetrician.
>
> "2. From the 14th day of October, 1955 until the 18th day of October, 1957, Affiant served as a member of the board of directors of United Security Life, an

Arizona corporation. Affiant served as a member of such board solely as an act of friendship and as an accommodation to one James E. Kelley, the organizer and then president of United Security Life. At no time did Affiant have any corporate stock or other financial interest in United Security Life. He did not receive and did not expect to receive any compensation for his services as a member of the board of directors.

"3. During the years 1955 to 1957, inclusive, United Security Life was a small and obscure business concern. It had no reputation in Arizona as a well-established and flourishing business establishment. Affiant's association with said company could not and did not lend status or prestige to Affiant and did not contribute or tend to contribute in any way to Affiant's medical practice or to the maintenance thereof.

"4. The circulation, if any, of Affiant's name as a director of United Security Life, to stockholders, policy holders or members of the public did not constitute the advertising of Affiant's practice as an obstetrician and did not contribute or tend to contribute in any way to Affiant's medical practice or the maintenance thereof. The friendship between the DePinto family and the family of James E. Kelley did not depend upon Affiant's service as a member of the board of directors of United Security Life. The marital community consisting of Affiant and his wife, Margaret DePinto, was not benefited, nor could it have received any benefits, monetary or otherwise, from Affiant's service as a member of the board of directors of United Security Life."

The Affidavit of Dr. Lentz reads:

"1. Affiant is a doctor of medicine and has engaged in the general practice of medicine as a physician and surgeon, in Phoenix, Arizona, for more than 20 years last past. Affiant is now, and, for approximately four years, has been, a member of the board of directors of National Producers Life Insurance Company and its

predecessor National Life and Casualty Company, an Arizona corporation. Affiant has been the medical director of National Producers Life Insurance Company and its predecessor National Life and Casualty Company for more than 10 years last past. At all times during his association with National Life and Casualty Company, it was a rapidly growing and successful business concern.

"2. Affiant has been acquainted with Dr. Angus J. DePinto for more than 20 years last past. During that time, Dr. DePinto has had the reputation of being a competent and highly successful obstetrician.

"3. Affiant is informed that from October, 1955 to October, 1957, Dr. DePinto served as a member of the board of directors of United Security Life, an insurance company organized under the laws of the State of Arizona. Affiant is further informed that at no time did Dr. DePinto have any stock or other financial interest in United Security Life and that he received no compensation for his services as a member of its Board of Directors. Based upon such information and based upon Affiant's experience as a doctor and member of the board of directors of a successful life insurance company, it is Affiant's opinion that the service of Dr. DePinto as a member of the board of directors of United Security Life could not have been of any benefit, financial or otherwise, to Dr. DePinto or to the marital community consisting of Dr. DePinto and his wife, Margaret DePinto.

"4. It is the opinion of Affiant that Dr. DePinto's service as a member of the board of directors of United Security Life could not have been expected to, and did not, enhance the status or prestige of Dr. DePinto as a practicing obstetrician or otherwise, and did not contribute or tend to contribute in any way to Dr. DePinto's medical practice. Affiant is further of the opinion that the circulation, if any, of Dr. DePinto's

name as a director of United Security Life, to its stockholders, its policy holders and members of the general public, did not constitute the advertising of Dr. Pinto's practice as an obstetrician and could not have had any value in the maintenance of Dr. DePinto's practice as an obstetrician."

The Affidavit of Paul M. Roca reads:

"1. Affiant is a resident of Phoenix, Arizona, and a member of the law firm of Lewis, Roca, Scoville, Beauchamp & Linton. He is a member of the State Bar of Arizona and has practiced law in the City of Phoenix, Arizona, for more than 20 years last past.

"2. Affiant is one of the authors of the Arizona Insurance Code and, for more than 15 years last past, has specialized in the practice of insurance law. He has handled the legal work incident to the organization, incorporation and operation of numerous insurance companies organized under the laws of the State of Arizona, and has, from time to time, served as a member of their boards of directors.

"3. In the year 1952, Affiant handled the legal work incident to the organization and incorporation of United Security Life, an Arizona corporation. Thereafter, and until about March of 1955, Affiant acted as legal counsel for said corporation and for a period of time served as a member of its board of directors.

"4. Affiant is acquainted with Dr. Angus J. DePinto of Phoenix, Arizona. For many years, Dr. DePinto has had the reputation of being one of the most competent and successful obstetricians practicing in Phoenix, Arizona.

"5. Affiant is informed that Dr. DePinto became a member of the board of directors of United Security Life on or about October 14, 1955, and continued as a member of such board until on or about October 18, 1957. Affiant is further informed that at no time did

Dr. DePinto own any stock or have any financial interest in said company; that Dr. DePinto did not receive any compensation for serving on its board of directors and that Dr. DePinto attended few, if any, meetings of the board of directors and took no active participation in the management of said company.

"6. Based upon the information referred to in the preceding paragraph and based upon Affiant's knowledge of the insurance business in the State of Arizona and, particularly, his knowledge of the affairs of United Security Life, Affiant states that any personal contacts which Dr. DePinto may have made or any publicity which Dr. DePinto may have received as a member of the board of directors of United Security Life, did not contribute to or enhance, and could not have been expected to contribute to or enhance, Dr. DePinto's status and prestige in the community, could not have constituted 'advertising' of his practice as an obstetrician which would have had any value whatsoever and could not have resulted in any benefits, monetary or otherwise, to Dr. DePinto or to the marital community consisting of Dr. DePinto and his wife, Margaret DePinto.

"7. It is the opinion of Affiant that, at the time Dr. DePinto became a member of the board of directors of United Security Life, it could not then be expected that Dr. DePinto or the marital community consisting of Dr. DePinto and his wife, Margaret DePinto, would receive any benefit of any kind as the result of Dr. DePinto's service on said board."

3. Questions.

The questions involved in these Appeals are as follows:

1. Did the pleadings, depositions and admissions on file, together with the affidavits, show that there was no genuine issue as to any material fact and that appellees were entitled to judgment as a matter of law?

2. Were appellants entitled to a preliminary injunction restraining appellees from attempting to satisfy the judgment entered against DePinto in Cause No. Civ.-2974-Phx. out of the community property of appellants?

C.

SPECIFICATIONS OF ERROR

Specification of Error No. 1.

The lower Court erred in entering summary judgment in favor of appellees and against the appellants dismissing the Complaint for the reasons:

A. Appellees were not entitled to a summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

B. The pleadings, depositions (Transcript of Testimony) and admissions on file, together with the affidavits, show that there was a genuine issue as to material facts and that appellees were not entitled to judgment as a matter of law.

C. The record herein discloses that the aforesaid judgment entered against DePinto in Cause No. Civ.-2974-Phx. was not a community obligation of appellants and could not legally be satisfied out of their community property.

Specification of Error No. 2.

The lower Court erred in failing to enter a preliminary injunction restraining appellees from attempting to satisfy the aforesaid judgment out of the community property of appellants during the pendency of the action, for the reason that appellants would suffer irreparable harm if their community property were sold under execution to satisfy the aforesaid judgment.

D.

ARGUMENT

1. Record Does Not Support Summary Judgment.

Arizona is a community property state. Since 1925, the Supreme Court of the State of Arizona and this Court have uniformly held that the community property of husband and wife is not liable for, or subject to, the separate debts or obligations of either spouse. *Cosper v. Valley Bank,* 28 Ariz. 273, 237 P. 175; *Payne v. Williams,* 47 Ariz. 396, 56 P.2d 186; *Tway v. Payne,* 55 Ariz. 343, 101 P.2d 455; *Babcock v. Tam,* 156 F.2d 116 (9th Cir. 1946); *Shaw v. Greer,* 67 Ariz. 223, 194 P.2d 430; *Barr v. Petzhold,* 77 Ariz. 399, 273 P.2d 161.

With respect to tort claims, particularly those based on negligence, the Supreme Court of Arizona has held that the community is liable for damages resulting from the acts of a spouse which are done while furthering a community purpose. The case of *Hays v. Richardson,* 95 Ariz. 64, 386 P.2d 791, involved an automobile accident which occurred while the husband was on his way to pick up his wife and children. The Supreme Court of Arizona stated:

> "Appellants contend that in determining whether the act was committed in furtherance of a community purpose, we must inquire into the very act itself and the mere fact the tort was committed while the spouse was on the way to do something for the benefit of the community is not controlling, citing 1 de Funiak, § 182 at p. 526 (1943). This is not the law in Arizona. In negligence cases we will not only inquire into the very act itself but the surrounding circumstances as well to make this determination because rarely does one run a red light or collide with another for the specifiic purpose of benefiting the community. In Selaster v. Simmons, 39 Ariz. 432, 7 P.2d 258 (1932) this court

considered the surrounding circumstances in determining there was a community purpose involved. See also Chapman v. Salazar, 40 Ariz. 215, 11 P.2d 613 (1932). Applying this rule we note that appellants came to Phoenix for one main reason, namely, to permit the children to participate in the T.V. show. When Hays went to pick up the wife and children after the show this was merely one phase of the entire project. We hold therefore that the husband was engaged in a community purpose at the time of the accident.

* * * * * * *

"It is undisputed that if one spouse is negligent while furthering a community purpose, the community is liable for damages resulting therefrom. Selaster v. Simmons, supra; Chapman v. Salazar, supra."

In *McFadden v. Watson,* 51 Ariz. 110, 74 P.2d 1181, the Supreme Court of Arizona held that the community was liable for libelous and slanderous acts of the husband which were done to protect the interests of a company in which he was a partner. The Court said:

"The evidence leads to the irresistible conclusion that the libelous and slanderous acts were done to protect the financial interest of the Phoenix Fuel Company in a controversy arising because Watson believed that Wyatt had taken $40 in money belonging to the company. Watson was a partner in the company and, therefore, in protecting its interest, was protecting his own interest, and his financial interest in the company (on his own statement of its nature) was a community one. Such being the case, we think that any act done by Watson, in this behalf, was intended for the benefit of the community, and the community must be liable for the unfortunate results thereof."

Rodgers v. Bryan, 82 Ariz. 143, 309 P.2d 773, involved an assault and battery upon the plaintiff by the defendant

husband. The attack occurred at the defendants' combination trading-post, store, restaurant and gas station. With respect to the contention that the conduct of the husband was not in furtherance of any community interest, the Supreme Court of Arizona stated:

> "We do not agree, and point out that Buck Rodgers' intentions, by his own admissions were to protect the morals of his family, hotel guests, and his property against trespass. These were obviously community interests. His conduct and actions were intended to be performed in behalf of the community, and his separate property and that of the community are liable for the unfortunate results of his violent conduct. McFadden v. Watson, 51 Ariz. 110, 74 P.2d 1181; Ruth v. Rhodes, 66 Ariz. 129, 185 P.2d 304."

The case of *Babcock v. Tam,* 156 F.2d 116 (9th Cir. 1946), was instituted for the purpose of enforcing a judgment against the community property of the judgment debtor and his wife. The judgment arose out of an accident in which the judgment debtor was involved while driving his automobile on business connected with his separate property. This Court held that the judgment could not be satisfied out of community property, and said:

> "It is correctly claimed by appellant that the Arizona state community law relating to the issues of the instant case is similar in some respects to the Washington state law. Selaster v. Simmons, 1932, 39 Ariz. 432, 7 P.2d 258. See Tway v. Payne, 1940, 55 Ariz. 343, 101 P.2d 435. In the case of McFadden v. Watson, 1938, 41 Ariz. 110, 74 P.2d 1181, 1182, the court announced the governing Washington rule, as stated in Floding v. Denholm, 1905, 40 Wash. 463, 82 P. 738, 739: 'The rule now is that community property is liable for a debt created by the husband for the benefit of the community. But such property is not liable for a debt

created by a tort of either spouse, or one which is not for the benefit of the community.' In Werker v. Knox, 1938, 197 Wash. 453, 85 P.2d 1041, 1043, the court says: 'It is in those cases where the husband has caused a negligent injury through the use of an automobile that the tendency of the courts to go to an extreme limit to fix liability upon the community has been most clearly exhibited * * *.' This statement, however, is preceded by the sentence, '*But * * * there can be no recovery against the community unless the husband was engaged in doing something which could be said to be beneficial to his principal, the marital community.*' In Cosper v. Valley Bank, 1925, 28 Ariz. 373, P. 175, it was held that where a judgment arises out of a transaction wholly regarding separate property and in no way affecting community interests, the person against whom the judgment was made is individually liable out of his separate property rather than the community as community property is liable only for community debts."

Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430, involved a question of whether or not judgments obtained against a Navajo County deputy sheriff and the Chief of Police of the City of Winslow could be collected from the community property of the judgment debtors and their respective wives. The judgment was predicated upon the malicious and unlawful arrest and imprisonment of the judgment creditor. The Supreme Court of Arizona held:

"It seems to us that the malicious tort committed by these defendants, not committed in connection with the management of the community property, may be likened to a separate crime of one of the spouses. In Newbury v. Remington, 184 Wash. 665, 52 P.2d 312, it was held that the marital community was not liable for an assault committed by a husband motorist who was angered because he thought plaintiff ran through an

> arterial highway without stopping. The court reasoned that the tort was committed by the defendant as an aggressor and not for the benefit of the community nor connected with the husband's management thereof. None of the acts committed by these defendants were within the scope of the duties of the office, but rather they were entirely without it.
>
> * * * * * * *
>
> "Being of the opinion that a malicious tort committed by one of the spouses without the knowledge, consent, or ratification of the other and not resulting in a benefit to the community is not a community obligation, it follows that the debt sued on was the separate obligation of the defendant husbands and that the order quashing the writs of garnishment levied to collect salaries owing to the community was correctly entered."

In the light of the above-mentioned authorities, there can be no doubt as to the law of the State of Arizona with respect to the liability of the community for the tort of one of the spouses. If the act, which gives rise to the cause of action, was committed by one of the spouses "while furthering a community purpose", the community is liable for damages resulting therefrom. We do not, however, find any Arizona cases which deal with a tort committed by husband or wife while engaged in some activity which was embarked upon only for the purpose of accommodating a friend. In the case at Bar, we are concerned with a judgment which was obtained against Dr. DePinto upon the theory that he was negligent in carrying out his duties as a director of United Security Life. The record herein discloses, without contradiction, that Dr. DePinto was serving on the Board of Directors of United solely as an accommodation to his friend Kelly. (R.T. 13-38, 33-34) Under the circumstances, his conduct could no more impose liability upon the marital

community than if he had signed an accommodation note for Kelly. In *Perkins v. First National Bank of Holbrook,* 47 Ariz. 376, 56 P.2d 639, the Supreme Court of Arizona stated:

> "Interveners reduce their second assignment to this proposition of law: That Charles Perkins, as a member of the community, had no power under the law without the knowledge and consent of his wife, Mary L. Perkins, to use the community assets to guarantee the debt of a stranger to the community; it deriving no benefit therefrom. This proposition is confirmatory of what is settled law in this jurisdiction. Section 2175, Revised Code of 1928, makes the community property liable for the community debts contracted by the husband. And in *Cosper v. Valley Bank,* 28 Ariz. 373, 237 Pac. 175, we held the community was not liable for a debt contracted by the husband in no way connected with the community and from which the community received no benefit. This would protect the community from a liability of the husband as surety or guarantor, unless it was in aid of, or for, the community. *Sun Life Assur. Co. v. Outler,* 172 Wash. 540, 20 Pac. (2) 1110."

Again, in *Payne v. Williams,* 47 Ariz. 396, 56 P.2d 186, the Supreme Court of Arizona said:

> "The motion to quash was based on the theory (a) that the community assets may not be held for a separate debt of one of the spouses, and (b) that the indorsement of a note for accommodation only is a separate debt of the spouse so indorsing and not of the community. We think the law in Arizona has been well settled in the affirmative on the first point by the case of *Cosper v. Valley Bank,* 28 Ariz. 373, 237 Pac. 175. *And that an accommodation note signed by the husband, and which does not benefit the community estate, is his separate debt is so plain that it needs no argument to support it.*" (Emphasis supplied.)

It will be remembered that Dr. DePinto had no financial interest whatsoever in United. He did not receive and did not expect to receive any compensation whatsoever for serving on its Board of Directors. (R.T. 14-16). He obtained no benefit of any kind whatsoever from serving on the Board of United other than the personal satisfaction of helping a friend. (R.T. 21). In denying appellants' Motion for Preliminary Injunction the lower Court concluded that Dr. DePinto's service on the Board of Directors of United "was for a community purpose and was beneficial to the community of the plaintiffs." This conclusion was not predicated upon any evidence in the record with the exception of testimony that a friendly relationship existed between the DePintos and the Kellys. The lower Court said:

> "In our free enterprise society the corporation is the specific organ through which a modern society discharges its basic economic functions. The directors of corporations hold great power and have become a major leadership group, and as such have great responsibilities to the enterprise and the people they manage, and to the economy and society.* As a concomitant of such responsibilities and power, directors of corporations enjoy positions of prestige and high status in the community.
>
> Such status and such prestige along would, without anything else, confer a benefit upon the community of the plaintiffs where the husband as here served on the Board of Directors of a profit corporation.
>
> In this case we have more: we have such direct benefits as the circulation of the plaintiff-husband's name to members of the public to whom stock in the defendant corporation was being sold, thus resulting in an ethical form of advertising for a physician and surgeon. Similar benefits flow from the circulation of his name among the policyholders and the other directors in the defendant insurance company.

> Even the assertion by the plaintiff-husband that he took a place on the Board of Directors in order to accommodate a friend of the plaintiff, fostered a community purpose by furthering the friendship between the De Pinto marital community and the Kelly marital community. (*See for example, A.R.S. § 10-191 et seq. concerning the duties of directors.)" (T.R. 10).

The assumptions which were made by the trial Court were completely dissipated by the testimony and affidavits of Dr. DePinto, and the affidavits of Dr. Lentz and Paul Roca hereinabove quoted. (T.R. 29-34.) Paul Roca is a prominent Phoenix attorney who is one of the authors of the Arizona Insurance Code and who, for more than 15 years last past, has specialized in the practice of insurance law. He handled the legal work incident to the organization, incorporation and operation of numerous insurance companies including United. Mr. Roca stated:

> "that any personal contacts which Dr. DePinto may have made or any publicity which Dr. DePinto may have received as a member of the board of directors of United Security Life, did not contribute to or enhance, and could not have been expected to contribute to or enhance, Dr. DePinto's status and prestige in the community, could not have constituted 'advertising' of his practice as an obstetrician which would have had any value whatsoever and could not have resulted in any benefits, monetary or otherwise, to Dr. DePinto or to the marital community consisting of Dr. DePinto and his wife, Margaret DePinto."

The lower Court felt that Dr. DePinto's service on the Board of United "fostered a community purpose by furthering the friendship between the DePinto marital community and the Kelly marital community". We submit that, under the law of the State of Arizona, the community cannot

be held liable for an act of the husband which is performed solely as an accommodation to a friend. If a husband makes a commitment for the benefit of a corporation in which he has a substantial financial (community) interest, such act will be deemed to be in furtherance of the community affairs. As indeed it is. *Donato v. Fishburn,* 90 Ariz. 210, 367 P.2d 245. *Osborn v. Massachusetts Bonding and Insurance Co.,* 229 F.Supp. 674 (D.C. Ariz. 1964). Compare, however, the case of *American Surety Co. of N.Y. v. Sandberg,* 244 F. 701 (9th Cir. 1917), wherein this Court held that the community was not liable upon an indemnity agreement signed by the husband on behalf of a corporation in which he had no financial interest. The trial Court found: "That neither of the defendants was ever a stockholder of the construction company, and neither had any financial interest in that company, and Peter (the husband) signed the indemnity agreement at the request and for the accommodation of one Mettler, who is a large stockholder and an officer of the construction company, *and an old friend of Peter's* * * *." The *American Surety Company* case was predicated upon Washington law. The Supreme Court of Arizona has said that: "We have always held that our community property law was more like that of the State of Washington than of any of the other community states, and that decisions from that state were very persuasive." *McFadden v. Watson, supra.*

Not only have the Courts held that an act done merely because of friendship will not be considered as "furthering a community purpose", but that an act done because of blood relationship will not be so considered. In the case of *Sun Life Assur. of Canada v. Outler,* 172 Wash. 540, 20 P.2d 1110, plaintiff instituted an action to recover the amount due on a promissory note executed by Author P.

Outler and his wife, Irma. Irma was the daughter of the defendants, Mr. and Mrs. George E. Kellough. Mr. Kellough guaranteed payment of the promissory note solely as an accommodation for his daughter-in-law. The Supreme Court of Washington overruled one of its prior decisions and stated:

> "The application of the principal of that case, to the case at bar, would simply mean that the husband's indorsement, without consideration, of the son-in-law's note, would create a community obligation—this upon the theory that the wife, prompted by maternal affection, would be presumed to give her consent and approval to the transaction, even though she did not know about it. Such an act of a husband, depending upon the assumption of knowledge of his wife's affection for their child, does not meet the test of business or benefit to the community. The marital community, with respect to the subject-matter under consideration, is essentially a business concern, and the power of its manager, the husband, should be controlled strictly by his statutory authority, not by what may appear on the surface to be the promptings of a generous paternal impulse. Otherwise, without consent or knowledge of the wife, the community estate may be depleted by transactions in which it can have no possible chance to benefit."

It should be noted that the *Sun Life Assur. Company* case was cited by the Supreme Court of the State of Arizona in support of its decision in *Perkins v. First National Bank of Holbrook, supra.*

In the case of *Forsythe v. Paschal,* 34 Ariz. 380, 271 P. 865, the Supreme Court of Arizona explained why the marital community should be insulated from obligations incurred by one of the spouses other than in furtherance of some community purpose:

> "The state's principal interest in the marriage status is the protection of the family as a unit, and of the minor childen. The whole history of our legislation in Arizona, as well as elsewhere, shows this to be true. There are few things which would do more to destroy the solidarity of family life and the proper maintenance of the children of the marriage than the possibility that the community estate and earnings primarily intended by the state for this protection could be diverted from that purpose to satisfy debts in no way connected with the family. Even in the ordinary partnership, a judgment against the individual partner cannot be collected from partnership assets until after the business is wound up. Much more is this necessarily true of the marital partnership, and since it is against public policy for that to be destroyed, except when the state, for good cause shown, approves the dissolution of the family unit, until such legal dissolution occurs it would follow a creditor of the one partner may not enforce a judgment for an individual debt against the property of the community."

We respectfully submit that, in the case at Bar, there is no evidence which supports, in any way, the conclusion that Dr. DePinto's services upon the Board of Directors of United were "in furtherance of a community purpose." To the contrary, the evidence expressly, specifically and incontrovertibly, shows that such service was not in furtherance of such purpose. The entry of summary judgment against appellants was, therefore, erroneous, and must be reversed.

2. Preliminary Injunction.

It is apparent that, after a trial on the merits, appellants will be entitled to a decree enjoining appellees from having judgment in Cause No. Civ.-2974-Phx. satisfied out of their

community property. *Merritt v. Newkirk,* 155 Wash. 517, 285 P. 442; *Dempsey v. Oliver,* 93 Ariz. 238, 379 P.2d 908; 42 *C.J.S.* 53, § 552, 41 *C.J.S.* 979, § 458e. Although an order was entered in the DePinto bankruptcy proceedings staying execution sale of appellants' property, appellees have asked the Bankruptcy Court for permission to proceed with such sale. It is obvious that a forced sale of such properties, pending the final disposition of this action, will result in irreparable injury to appellants for the reasons stated in their verified Complaint:

> "(a) Plaintiffs' community personal property will be sold under execution at a forced sale without right of redemption and at prices substantially less than the value thereof.
>
> "(b) Plaintiffs' community real property will be sold under execution at forced sale and at prices substantially less than the value thereof.
>
> "(c) Numerous parcels and items of plaintiffs' community real and personal property may be sold to numerous buyers with the result that plaintiffs will be forced to maintain multiple actions for the purpose of recovering their property.
>
> "(d) Plaintiffs' community property will wrongfully and illegally get into the hands of third parties who may dissipate the same or otherwise place the same beyond recovery by plaintiffs.
>
> "(e) Plaintiffs' bank accounts will be subject to garnishment with the result that plaintiffs will not be able to carry on their personal and business affairs in an orderly manner.
>
> "(f) Plaintiffs will be wrongfully and illegally deprived of their property under circumstances which will make it impossible to determine plaintiffs' damage with any degree of certainty in an action or actions at law.

"(g) The aforesaid judgment will constitute an apparent lien or cloud upon the title to plaintiffs' said community property which will make it impossible for plaintiffs to sell, mortgage or otherwise deal with said property." (T.R. 3)

Upon reversal of the judgment herein, the case should be remanded to the lower Court, with instructions to issue a preliminary injunction as prayed for by appellants. In view of the fact that the properties of appellants are in custody of the Bankruptcy Court, such injunction should be conditioned on the furnishing of a nominal bond.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. JENCKES, JR.

(Exhibits Follow)

Exhibits